

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK, by
LETITIA JAMES, Attorney General of the
State of New York,

Petitioner,

-against-

VDARE FOUNDATION, INC.,

Respondent.

Index No. _____

**AFFIRMATION OF GOOD
FAITH AND IN SUPPORT
OF THE ATTORNEY
GENERAL’S ORDER TO
SHOW CAUSE TO COMPEL
COMPLIANCE WITH AN
INVESTIGATIVE
SUBPOENA**

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Yael Fuchs, an attorney duly admitted to the Bar of this State, affirms under penalties of perjury pursuant to Civil Practice Law and Rules § 2106 as follows:

1. I am an Assistant Attorney General in the Office of Letitia James, Attorney General of the State of New York, who appears on behalf of the People of the State of New York in this special proceeding.

2. I submit this Affirmation in support of the Office of the Attorney General’s application by order to show cause seeking expedited relief in connection with an investigative subpoena *duces tecum* (the “Subpoena”) issued by the Attorney General in connection with an investigation of Respondent VDARE Foundation, Inc. (“VDARE”).

3. I am familiar with the facts and circumstances set forth in this affirmation, which are based upon my personal knowledge and information contained in the files of the Office of the Attorney General (“OAG”).

4. As set forth below and in the accompanying Verified Petition and Memorandum of Law, in connection with a lawful law enforcement investigation, the Attorney General has issued an investigative subpoena and endeavored to resolve the issue of VDARE’s compliance

with that subpoena and has been unable to reach a resolution. The OAG now seeks an order pursuant to CPLR § 2308(b) to enforce its non-judicial subpoena without further delay.

5. As set forth in greater detail in the accompanying Memorandum of Law, the Attorney General is vested with expansive oversight authority of not-for-profit entities, their representations to donors and potential donors, and their use of charitable assets under the New York Not-for-Profit Corporation Law, the Estates, Powers and Trusts Law and the Executive Law.

6. Respondent VDARE is a not-for-profit corporation organized under the laws of the State of New York. VDARE was previously known as the Lexington Research Institute, Limited, and incorporated in New York under that name in 1999. A true and correct copy of VDARE's Certificate of Incorporation is attached hereto as Exhibit A.

7. VDARE's Certificate of Incorporation provides that:

5. Notwithstanding any other provisions of these articles, the Corporation is organized exclusively for charitable, educational, and literary purposes and intends at all times to qualify as exempt from federal income tax under section 501(c)(3) of the United States Internal Revenue Code, as now in effect or as subsequently amended. Accordingly, the Corporation shall not be operated for pecuniary profit or financial gain, no part of the net earnings of the Corporation shall inure to the benefit of any private individual, no substantial part of the Corporation's activities shall consist of carrying on propaganda or otherwise attempting to influence legislation, and the Corporation shall not participate or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office.

6. The Corporation may pay reasonable compensation to any person for services rendered to the Corporation in furtherance of its lawful purposes.

Ex. A at 1.

8. In 2000, VDARE, then still known as the Lexington Research Institute, Limited, applied for recognition as a tax-exempt organization by the Internal Revenue Service (IRS). A

true and correct copy of VDARE's Form 1023 Application for Recognition of Exemption is attached hereto as Exhibit B.

9. VDARE was recognized as tax-exempt (under I.R.C. section 501(c)(3)) by the IRS in or about May 2001. A true and correct copy of an IRS confirmation letter addressed to the Lexington Research Institute Limited dated August 9, 2005 is attached hereto as Exhibit C.

10. In 2009, VDARE registered as a charity with the Charities Bureau of the Office of the Attorney General, under both the Estates, Powers and Trusts Law ("EPTL") and under the Executive Law. A true and correct copy of VDARE's CHAR 410 initial registration form is attached hereto as Exhibit D.

11. VDARE filed its initial registration with the Charities Bureau in 2009, despite having begun operations in New York in 2000. New York law requires that charities register with the Charities Bureau prior to any solicitation in New York, Exec. Law § 172, and within six months "after any property held by [a trustee] or any income therefrom is required to be applied to charitable purposes," EPTL § 8-1.4(d).

12. In its CHAR 410, VDARE described its purpose as "creat[ing] and manag[ing] internet publications." Ex. D at 3.

13. As a charity operating and soliciting in New York, VDARE is required to file annually a CHAR500 Registration Form. The CHAR500 must be signed by two officers and asks for self-reporting regarding certain basic information, including the organization's contact information, the number and identity of board members, and information relating to fundraising.

14. The CHAR 500 also requires that organizations file and certify a copy of their annual IRS Form 990. According to the IRS, the Form 990 "is the IRS' primary tool for gathering information about tax-exempt organizations, educating organizations about tax law

requirements and promoting compliance. Organizations also use the Form 990 to share information with the public about their programs.” <https://www.irs.gov/charities-non-profits/form-990-resources-and-tools> (last visited December 14, 2022).

15. As part of its required filings with the IRS and the Charities Bureau, VDARE, since its belated registration, files an IRS Form 990 and certifies to its accuracy each year. According to VDARE’s IRS Form 990, the organization’s mission is to “Create and manage internet publication.” True and correct copies of VDARE’s Form 990 for 2018-2020 are attached hereto as Exhibits E-G.

16. As of the date of this Affirmation, VDARE has not filed its 2020 or 2021 CHAR500 Forms, which would include the IRS Form 990 as an attachment, and is delinquent in its required annual registration with the Charities Bureau.

17. VDARE reports on its Form 990 that its website is WWW.VDARE.COM. Exs. E-G.

18. According to VDARE’s Form 1023 Application filed with the IRS and the Charities Bureau, Peter Brimelow (“Brimelow”) is the “Director/CEO/Chairman” of VDARE. Ex. B at 3. Maggie Brimelow is listed as Secretary/Treasurer on VDARE’s Form 1023 Application. *Id.* Upon information and belief, Maggie Brimelow was Peter Brimelow’s wife prior to her death in 2004.

19. For certain years, Lydia Brimelow is listed as “Secretary, Treasurer and Publisher” of VDARE on VDARE’s Char500 filed with the Charities Bureau. Upon information and belief, Lydia Brimelow is Peter Brimelow’s current wife. This relationship is not listed on Schedule L or Schedule O of the 2020 IRS Form 990, as is required by law. Lydia Brimelow is listed as a director of VDARE in its IRS Form 990 for 2020, but not in other years. John

Brimelow is Peter Brimelow's brother and is listed as a director of VDARE in its Form 990 for 2018-2020. *See* Exs. E-G.

20. As set forth in its IRS 990 for 2020, the most recent filing that is publicly available, VDARE's board and management for 2020 consisted entirely of members of the Brimelow family: Peter, Lydia, and John. Ex. G.

21. VDARE and its current and past board members are the subject of an ongoing investigation by the Attorney General concerning potential financial improprieties, including unlawful related party transactions between VDARE and affiliated entities, officers and board members, excessive compensation, private inurement, and violations of statutory and common law governance standards.

22. In February 2020, VDARE was publicly reported to have bought a historic, 9,300-square foot castle in a West Virginia resort town for \$1.4 million. *See* Rick Steelhammer, Berkeley Springs Castle Becomes Conference Site for VDARE, an Organization to 'Keep America American,' Charleston Gazette-Mail (Mar. 7, 2020), available at https://www.wvgazettemail.com/news/berkeley-springs-castle-becomes-conference-site-for-vdare-an-organization-to-keep-america-american/article_170131e9-db7c-500f-8a57-91e1fcc1ad66.html (last visited December 14, 2022).

23. In a February 2020 public announcement on VDARE.com, VDARE described the castle as a meeting space "where we can meet and share ideas without fear of deplatforming." *See* Lydia Brimelow, Lydia Brimelow: We Got the Keys to the Castle!, VDARE.COM (Feb. 26, 2020), <https://vdare.com/articles/lydia-brimelow-we-got-the-keys-to-the-castle> (last visited December 14, 2022).

24. Months later, Brimelow continued to represent to donors that the castle was a necessity—stating in a solicitation that VDARE “had to buy the Berkeley Springs Castle.” *See* “VDARE.com Editor Peter Brimelow: Please Give By Credit Card BEFORE MIDNIGHT—While You Still Can!”, <https://vdare.com/articles/vdare-com-editor-peter-brimelow-please-give-by-credit-card-before-midnight-while-you-still-can> (last visited December 14, 2022).

25. Upon information and belief, Peter Brimelow, Lydia Brimelow, and their three children moved into the Berkeley Springs Castle and have been using it as their primary family residence since March 2020.

26. On VDARE.com, the Brimelows have posted photos of the family celebrating holidays at the castle such as the 4th of July (<https://vdare.com/posts/the-brimelow-family-wishes-you-a-happy-independence-day> (last visited December 14, 2022)), and Christmas Eve (<https://vdare.com/articles/peter-brimelow-merry-christmas-from-vdare-com-f3d0cb33-af41-4d90-93b9-c82cd46c5950> (last visited December 14, 2022))).

27. In a post dated December 4, 2020, a VDARE.com contributor reported visiting the castle and noted that “Peter and Lydia Brimelow have moved in and spend most of their time there with their [children]....”. *See* <https://vdare.com/radio-derb/castling-with-vdare-com-senate-visa-giveaway-covid-hypocrisy-and-students-cancel-black-etc> (last visited December 14, 2022).

28. Public filings indicate that, in December 2020, VDARE conveyed the entirety of the Berkeley Springs Castle property in two separate transactions to two West Virginia corporations that had been incorporated by Lydia Brimelow five months earlier. VDARE conveyed the castle itself and the land that it sits on to the Berkeley Castle Foundation (BCF), a putative non-profit corporation. VDARE conveyed the remaining land, consisting of eight

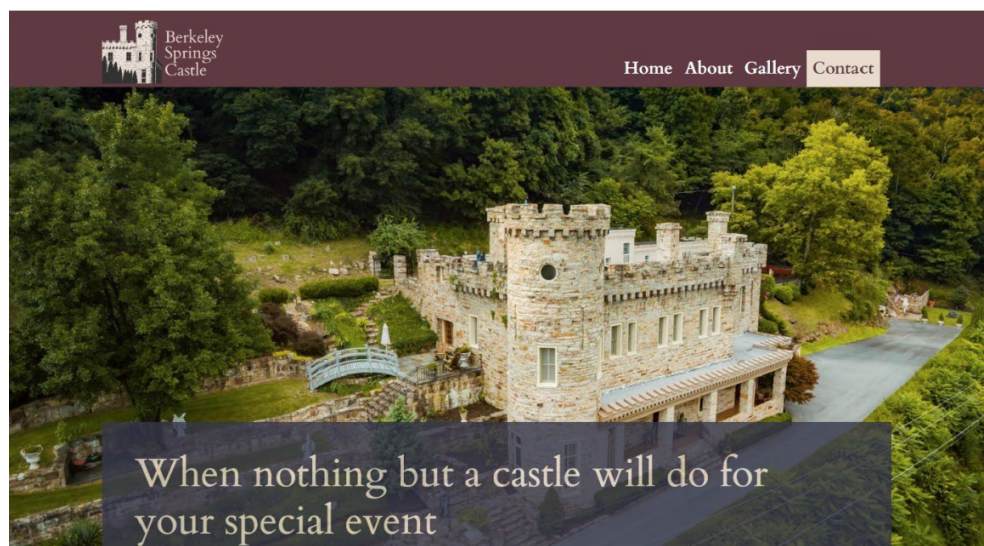
parcels, to BBB, LLC, a for-profit corporation. Transfer of charitable assets to a for-profit entity without fair consideration is a violation of both New York and federal law. True and correct copies of these deeds are attached as Exhibit H and I.

29. This transaction is not reported on the VDARE 2020 IRS Form 990, as required by law, nor was it submitted to the Charities Bureau for approval, as required by Sections 510 and 511 of the Not-for-Profit Corporation Law.

30. According to records on file with the West Virginia Secretary of State, Lydia Brimelow incorporated BCF as a West Virginia domiciled nonprofit on July 21, 2020. A copy of the Business Organization Detail page for BCF from the West Virginia Secretary of State's website is attached as Exhibit J.

31. BCF was recognized as a tax-exempt organization by the IRS by notice dated January 20, 2022. A copy of BCF's tax exemption recognition notice is attached hereto as Exhibit K.

32. Using the tagline "When nothing but a castle will do," BCF offers to rent the castle as an event space through its website. According to that website, BCF began taking event reservations in summer 2020.



<https://www.berkeleyspringscastle.com/contact.html> (last visited December 14, 2022).

33. According to records on file with the West Virginia Secretary of State, Lydia Brimelow incorporated BBB, LLC as a West Virginia domiciled for-profit corporation on July 21, 2020. Lydia Brimelow is listed as BBB, LLC's organizer and manager. The organization's only listed business purpose is "Real Estate and Rental and Leasing—Real Estate—Lessors of Real Estate." A copy of the Business Organization Detail page from the West Virginia Secretary of state is attached as Exhibit L.

34. Announcements posted to VDARE.com in October 2021 indicate that the castle's "First Public Event" was an "Auction Preview Party" showcasing items from the castle that the Brimelows were selling in a private auction, including swords, a riding helmet, and a butter churn. *See* "Come To Our First Public Event! Castle Auction: Saturday, October 16th" at <https://vdare.com/posts/come-to-our-first-public-event-castle-auction-saturday-october-16th> ("VDARE.com bought the Berkeley Castle furnished, and we're retaining many of the beautiful pieces for Castle use. But there are just so many we can't use them all! So, in partnership with local auction house J Lawyer, we're offering the rest up to our friends and supporters.") (last visited December 14, 2022) *and* "Downsizing For The Historical Berkeley Springs Castle" at <https://www.jlawyerauctions.com/auctions/detail/bw70268> (last visited December 14, 2022).

35. Following the public reporting of the castle purchase, personnel in the Office of the Attorney General reviewed VDARE's Form 990s and other publicly available documents. The OAG identified several areas of concern which may constitute violations of VDARE's bylaws and/or New York law. For example, and without limitation:

- a. According to its IRS Form 990 for 2019, VDARE raised over \$4.2 million in contributions and grants in 2019, which is more than eight times its

publicly reported 2018 revenue and more than ten times its publicly reported 2017 revenue. VDARE did not file a report by an independent auditor for that year, as required for organizations soliciting in New York with revenue of over \$1,000,000. VDARE claimed an exemption from the requirement on the grounds that it raised less than the requisite \$25,000 from New York donors.

- b. According to VDARE's disclosures in Schedule J of the 990, VDARE does not appear to have any process in place for determining Brimelow's salary.
- c. According to VDARE's IRS Form 990 for 2019, Brimelow's reported compensation for 2019 nearly doubled from 2018, to \$345,364 — an amount equivalent to nearly half of VDARE's total program service budget for the year.
- d. According to Schedule L of VDARE's 990, rather than pay Brimelow directly, VDARE pays Brimelow's salary through an independent contractor, Happy Penguins LLC, which VDARE reports is owned by Brimelow. Under this arrangement, Peter Brimelow, VDARE's chief executive, is technically a Happy Penguins "leased employee" rather than a VDARE employee.
- e. In 2019, VDARE paid Happy Penguins more than Peter Brimelow's annual salary. Although Brimelow's reported salary for 2019 was \$345,364, VDARE also reported paying Happy Penguins LLC \$411,003. In 2019, VDARE also listed the Brimelows' residential home address in

Litchfield, Connecticut as its corporate address while reporting \$36,142 in “office expenses” and \$8,664 in “occupancy expenses” on its Form 990 — additional compensation to the Brimelows that was not properly reported. These financial arrangements may violate express conflict provisions in the N-PCL and VDARE’s bylaws.

- f. Lydia Brimelow’s position in the organization is inconsistently and incompletely reported. To the extent that she serves as an officer or director of VDARE, that family relationship, which should be disclosed, is not reported on VDARE’s Form 990.
- g. The VDARE Form 990 for 2020 contains additional statements which raise significant issues about compliance with governing law and use of charitable assets. For example, in response to Form 990, Part VI, Line 11b: Form 990 Review Process Schedule O represents that “No review was or will be conducted.” The IRS 990 at Section VI, question 12 represents that there is a conflict of interest policy (as required by New York Not-for-Profit Law) but the explanation of that policy is nowhere addressed on Schedule O, as required by the IRS. Schedule J, which requires disclosure of certain benefits to officers, leaves blank the question whether the officer receives a housing allowance or residence for personal use. Schedule L, which requires disclosures of transactions with interested persons, makes no mention either of Lydia Brimelow’s salary from VDARE or of the transaction providing a residence for use by the Brimelows.

36. In April 2020, Facebook suspended VDARE's Facebook account based on Facebook's determination that VDARE engaged in "coordinated inauthentic behavior" by creating a network of "fake accounts to create fictitious personas...drive traffic to off-platform sites, and evade enforcement." According to Facebook's analysis, VDARE's network consisted of "19 Pages, 15 Facebook accounts, and 1 Group" accounting for 207,700 followers. Facebook determined that VDARE's network spent "around \$114,000" buying ads to further its inauthentic behavior. If true, this could constitute a waste of charitable assets and breach of the Brimelows' fiduciary duties as VDARE officers. VDARE sued Facebook, alleging defamation, when Facebook published a copy of its 2020 report, and VDARE attached a copy of the report to its federal complaint. A true and correct copy of the April 2020 "Coordinated Inauthentic Behavior Report," as filed by VDARE, is attached as Exhibit M.

37. On June 24, 2022, the Attorney General personally served a subpoena *duces tecum* on VDARE by delivery to VDARE's designated agent for service, the Secretary of State of New York, in compliance with CPLR 311 and N-PCL § 306. A true and correct copy of the Subpoena is attached hereto as Exhibit N.

38. On June 24, 2022, the Attorney General mailed a copy of the Subpoena, by U.S. Mail Certified Return Receipt to the address identified in VDARE's most recent annual filing with the Charities Bureau (276 Cacapon Road, Berkeley Springs, West Virginia 25411), together with a copy of the Affidavit of Service prepared by OAG Investigator Donald C. Anselment and a cover letter confirming the nature of the document. A true and correct copy of the Attorney General's June 24, 2022 letter is attached hereto as Exhibit O.

Efforts to Obtain Subpoena Compliance Since July 2022

39. VDARE responded to receipt of the Attorney General's Subpoena by immediately insisting that the Subpoena be withdrawn as unlawful: on July 2, 2022, VDARE's then-counsel Frederick Kelly confirmed receipt of the Subpoena, demanded that the Subpoena be withdrawn in its entirety, and requested information regarding, *inter alia*, the subject matter of the investigation and the relevance of the documents sought in the Subpoena. True and correct copies of Kelly's July 2, 2022 email and its attachments are attached hereto as Exhibit P.

40. On July 18, 2022, counsel from the Attorney General's Office met telephonically with Kelly. During that call, Kelly asked the OAG to provide information regarding the nature of the investigation and expressed concerns regarding certain Subpoena requests, including requests that he believed were overbroad or called for production of documents protected by the attorney-client privilege. OAG counsel responded to Kelly's questions, with a reservation of rights, and identified concerns regarding: (1) the purchase and use of the castle; (2) benefits conferred upon the Brimelows; (3) whether the VDARE board is properly overseeing the finances of the organization; and (4) whether the organization is using charitable assets in accordance with its mission. The OAG also stated that to the extent counsel believed that production would invade attorney-client privilege, the Subpoena did not seek privileged communications and expressly instructed counsel to withhold such documents and provide a privilege log.

41. On July 20, 2022, Kelly sent a second letter to the OAG, by which VDARE renewed its request that the Subpoena be withdrawn and set forth individual objections to many of the Subpoena's individual requests on the grounds of overbreadth, vagueness, attorney-client

privilege, and that its requests sought the identities of VDARE readers, writers, and donors. A true and correct copy of VDARE's July 20, 2022 letter is attached hereto as Exhibit Q.

42. On July 27, 2022, the Attorney General responded by email to the objections raised in VDARE's July 20 letter. With a reservation of rights, counsel for the OAG attempted to address VDARE's concerns by clarifying individual Subpoena requests and agreeing that the names of certain individuals, including VDARE contributors and volunteer supporters, could be redacted from otherwise responsive records. A true and correct copy of the OAG email dated July 27, 2022 is attached hereto as Exhibit R.

43. In August 2022, VDARE retained substitute counsel — attorney Andrew Frisch — and indicated through that new counsel that it intended to comply with the Subpoena. Frisch contacted the OAG by phone and letter to identify himself as VDARE's new representative in connection with the Subpoena response and he requested additional time to collect and review potentially responsive material for production. In a letter on September 19, 2022, Frisch wrote: "I do not stand by my predecessor counsel's position that the Subpoena be withdrawn." He noted that there existed "a significant volume of electronically-stored and hard copy documents that need to be reviewed" and he confirmed that he had prepared the first of what he expected would be multiple rolling production deliveries. He also confirmed that he had redacted certain information in his first production delivery but had not "had ample time to fully evaluate bases underlying the redactions." A true and correct copy of Frisch's letter dated September 19, 2022 is attached hereto as Exhibit S.

44. VDARE made its first production of responsive material to the OAG on September 19, 2022, nearly two months after the Subpoena's originally stated deadline for completion of all production. The September 19 production contained 27 documents produced

without Bates numbers and bearing unmarked redactions. No log was provided with the production to identify or explain how and why the documents had been redacted.

45. The OAG requested a redaction log for VDARE's production immediately upon receiving the September 19 delivery and has repeated that request in the three months since. In an email on September 30, 2022, the OAG expressly insisted that productions be delivered in the form called for by the Subpoena and that all redactions be accompanied by "a log identifying the Bates range for any pages on which redactions appear, the legal basis for those redaction, and a general description of the category of information being withheld." The OAG's September 30 email explained that, without a redaction log, the Office had no means to "reliably identify what has been deleted from the material [VDARE was] producing and on what legal basis." A true a correct copy of the OAG's September 30, 2022 email is attached as Exhibit T.

46. In twelve weeks since its first delivery, VDARE has produced approximately 6,000 pages of material from its hard copy records that it identifies as responsive to the Subpoena. It has redacted that material without offering any legal basis for individual redactions or any explanation of how otherwise responsive material has been identified and segregated for redaction. The redactions are extensive, and they have been applied across almost every category of document produced, including VDARE board meeting minutes, VDARE bank statements, internal VDARE accounting ledgers, VDARE credit card statements, invoices sent to VDARE, financial records for the limited liability company (Happy Penguins LLC) from which VDARE has historically leased Peter Brimelow's services, and bank statements to accounts held personally by Peter and Lydia Brimelow. In one instance, VDARE appears to have redacted a magazine subscription renewal form addressed to Peter Brimelow that it also marked as Confidential.

47. On October 31, 2022, Lydia Brimelow certified to the OAG that, with limited exceptions, VDARE's production from its hard copy files was complete. A true and correct copy of Brimelow's October 31 certification is attached as Exhibit U. As certified, VDARE's hard copy production contains no responsive material from the following categories of record called for by the Subpoena: (i) solicitation materials sent by VDARE to potential contributors; (ii) documents related to the setting or adjusting VDARE's officer compensation; (iii) documents concerning past or future VDARE events located at the Berkeley Springs Castle property; (iv) documents concerning Director and Officer liability insurance held by VDARE for the benefit of its Board; (v) documents sufficient to demonstrate who controls VDARE's financial accounts; and (vi) communications between VDARE and its accountants.

48. On October 31, 2022, VDARE also identified 22 unique email accounts that together contained approximately 40 gigabytes of potentially responsive electronically-stored information. VDARE counsel stated on October 31 that review of those accounts would be completed on or before November 21, 2022. A true and correct copy of the October 31, 2022 letter to the OAG from VDARE counsel is attached, without its attached list of email account names, as Exhibit V.

49. VDARE did not produce any material from its electronic files as promised on November 21. In letters dated November 21 and November 28, attached as Exhibits W and X, VDARE counsel reported to the OAG that its email review was taking longer than expected. In its November 28 letter, VDARE counsel identified December 12, 2022 as a new deadline — set without input or consent from the OAG — by which it would complete an email production. No such production was ever provided.

50. The OAG has met with VDARE counsel, in person and by phone, on multiple occasions in the months since VDARE made its first September 2022 production. VDARE counsel has assured the OAG throughout that he was working diligently to comply with the Subpoena. The OAG has expressed concern over production delay in each of its contacts with VDARE counsel and has objected repeatedly to VDARE's continuing production of redacted material without any identified explanation of or legal basis for redaction.

51. On December 2, 2022, counsel for the OAG summarized its concerns with the pace and scope of VDARE's production to date in a letter addressed to VDARE counsel. A true and correct copy of the December 2, 2022 letter is attached as Exhibit Y.

52. As of the date of this filing, the Subpoena's deadline for production has been extended no fewer than six times — most recently to December 12, 2022. In total, these adjournments extended the Subpoena's stated response deadline by approximately twenty weeks.

53. As of the date of this filing, VDARE has not produced any material from the 22 individual VDARE email accounts that it identified on October 31 as containing potentially responsive material.

54. As of the date of this filing, VDARE has refused to produce any log identifying the material in its production that it has redacted and the legal basis on which it is withholding the redacted information.

55. On December 12, 2022, the same date that VDARE counsel independently selected for complete production of responsive VDARE email, VDARE filed a lawsuit in the U.S. District Court for the Northern District of New York seeking to have the Attorney General's investigative Subpoena declared unconstitutional. A true and correct copy of VDARE's

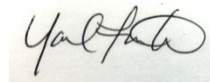
December 12, 2022 Verified Complaint is attached as Exhibit Z. The OAG believes that VDARE's claims in that action are without merit and will seek to dismiss the complaint.

56. In accordance with CPLR Rule 2217(b), I affirm that the Attorney General has not previously requested the relief sought by this application.

Dated: New York, New York
December 16, 2022

LETITIA JAMES
Attorney General of the State of New York

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